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THEY APPEAR TO BE THE SAME, BUT THEY ARE NOT THE SAME... A STUDENT PROFILING TECHNIQUE WILL NOT EFFECTIVELY DETER JUVENILE VIOLENCE IN OUR SCHOOLS

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Notes & Comments

They Appear to be the Same, But They are NOT the Same . . . A Student Profiling Technique Will Not Effectively Deter Juvenile Violence in Our Schools

*"Schools ought to be right next to our houses of worship as sanctuaries in America. They ought to be places where young people are completely safe and absolutely certain that they are. And each of us bears a responsibility."*¹

President Bill Clinton
Tuesday, August 17, 1999

INTRODUCTION

Traditionally, the purpose of schools was to educate children and prepare them for the future.² Schools provided students with the opportunity to excel in extracurricular activities, such as football, debate, and yearbook. Students could develop strong leadership skills by participating in student government and honor society. Furthermore, schools allowed each and every student the chance to grow and flourish in practically any area in which he/she chose. One would hope that the only violence in school would be the drama department's winter production of "Romeo and Juliet."³ In the play, Juliet finds her beloved Romeo "dead" and thus, stabs herself to death with a dagger. This scene of fictitious violence is generally acceptable in the schools.

¹ See U.S. Dep't of State, *President Clinton: Announcing New Steps to Reduce Youth Violence* (Aug. 17, 1999), at <http://usinfo.state.gov/usa/schools/whw817.htm> (last visited Nov. 11, 2000).

² See Michael Easterbrook, *Taking Aim at Violence: Preventing School Violence*, PSYCHOL. TODAY, July 1, 1999, at 52 (source on file with author).

³ WILLIAM SHAKESPEARE, *ROMEO AND JULIET* (Cornmarket Press, 1969) (1750).

Unfortunately, violence is not merely fictitious. A chilling amount of senseless acts of violence occur in our society today.⁴ What seems even more frightening is that a myriad of these offenders are juveniles.⁵ Certainly, violence occurs on our streets and, sadly enough, in our homes.⁶ However, who could ever imagine that violence would permeate into our schools? Whoever thought that Congress would have to create the "Gun-Free School Zones Act" to make it a federal crime to have a gun within 1000 feet of school?⁷ Unfortunately, violence has penetrated our schools.⁸ Schools no longer provide a safe-haven for those who want to learn geometry, U.S. history, and chemistry; but, they have now "... evolve[d] into a

⁴ See U.S. Dep't of Justice, *Handguns Used in More than One Million Violent Crimes: The Use of Semi-Automatic Guns in Murders is Increasing* (1995), at <http://www.ojp.usdoj.gov/bjs/pub/press/guic.pr> (last visited Jan. 23, 2000). The Department of Justice reports that in 1993 there were 4.4 million murders, robberies, rapes and aggravated assaults. Furthermore, approximately 1.3 million U.S. residents were attacked by a firearm bearing assailant. *Id.*

⁵ See Children's Defense Fund, *Keeping Children Safe in School: A Resource for States*, Dec. 1998. The National School Boards Association approximates that more than 135,000 guns are brought into schools each day. *Id.*

⁶ See *supra* note 4. See also B.E. Carlson, *Children's Observations of Interparental Violence*, in *BATTERED WOMEN AND THEIR FAMILIES*, 147-167 (A.R. Edwards ed., 1984). Over 3 million children are exposed to domestic violence each year. *Id.*

⁷ 18 U.S.C. § 922 (q) (2) (a) (1988). The Act provides that schools that do not implement a zero-tolerance policy regarding guns in their schools will receive no federal assistance under the Elementary and Secondary Act of 1965. See R. Craig Wood and Mark D. Chestnutt, *Violence in U.S. Schools: The Problems and Some Responses*, 97 ED. LAW REP. 619, 629 (1995); See also *United States v. Lopez*, 109 S.Ct. 1624 (1995); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES*, (Aspen Law & Business 1997). A twelfth grader was charged with violating the act when he was arrested for carrying a concealed .38 caliber firearm. The Supreme Court, however, in a 5-4 margin, declared the act unconstitutional. The Court held that the act exceeded the commerce clause since it was not substantially related to interstate commerce. *Id.*

⁸ See ABCnews.com, *Violence in US Schools: A List of Past School Shootings*, at <http://www.abcnews.go.com.sections/us/DailyNews.schoolshootings990420.html> (last visited Jan.30, 1999) [hereinafter *Violence in US Schools*]. On December 6, 1999, in Fort Gibson, Oklahoma, a 13-year old student allegedly came to school, fired his father's semi-automatic handgun, and injured four of his classmates. On November 18, 1999, in Deming, New Mexico, a 12-year old male student shot and killed a female student after lunch. On February 2, 1996, in Moses Lake, Washington, a 14-year old male student entered his algebra class with a hunting rifle and killed the teacher and two classmates. *Id.*

resting place for criminals.”⁹ “Every time violence slices into a school zone, our nation bleeds.”¹⁰

On March 24, 1998, in Jonesboro, Arkansas, at Westside Middle School, two young boys, aged 11 and 13, not only shot to death four female students and a teacher, but also seriously wounded 11 others during a false fire alarm.¹¹ Thirteen months later on April 20, 1999, in Littleton, Colorado, at Columbine High School, two more male students wearing long, black trench coats, opened fire in their suburban school and killed 15 students, including themselves.¹² Since 1996, an alarming 33 students have been killed and at least 70 have been wounded in school shootings.¹³ The Columbine massacre has permanently changed the way students, teachers, and administrators view their school safety.¹⁴ It is certainly disconcerting that students now even avoid going to school for fear of their own safety.¹⁵

After all of the grieving and fear has eased, each of these tragedies has left open questions focusing on how these tragic violent acts could have been prevented and what school administrations can do to prevent future violent incidents. One attempt to address the school violence epidemic is “student profiling.”¹⁶ Traditionally, the Federal Bureau of Investigation (FBI) developed profiling as a method to examine evidence and deduce a possible suspect or

⁹ Philip T.K. Daniel, *Violence and the Public Schools: Student Rights have been Weighted in the Balance and Found Wanting*, 27 J.L. & EDUC. 573 (1988).

¹⁰ See Robin Farmer, *Could Violence have been Stanchd?*, RICHMOND TIMES DISPATCH, Dec. 13, 1999, at B1.

¹¹ See *Violence in U.S. Schools*, *supra* note 8.

¹² *Id.*

¹³ See Steve Fainaru, *Volatile Mix of Pressures Faces Teens, Specialists say: Colorado School Killings/Societal Trends*, BOSTON GLOBE, Apr. 24, 1999, at A8.

¹⁴ Katie Wang, *Valley Schools Learn their Lessons on Security: School Bells are Becoming Alarm Bells as Educators Take Steps to Keep Incidents Like Littleton from Taking Place on their Campuses*, MORNING CALL (ALLENTOWN, PA), Aug. 29, 1999, at A1.

¹⁵ See *supra* note 5. Fear of being caught in the middle of the next violent attack in schools kept 5% of high school students home at least once. Furthermore, in 1995, an estimated 2.1 million students avoided one or more places at school for fear of their own safety. *Id.*

¹⁶ See *infra* notes 199–206 and accompanying text.

suspects of a crime.¹⁷ To create a profile, the FBI assembled a database of information about violent criminals' personalities, habits, and methods.¹⁸ The FBI originally profiled serial killers.¹⁹ Profiling appears advantageous since it helps law enforcement detect people whom they reasonably suspect fit a particular profile.²⁰ However, critics argue that profiling can unfairly target people simply because they manifest particular characteristics.²¹

Now, in response to school violence, a new spin on the traditional notion of profiling has developed to profile our students.²² School officials, legitimately frightened that the new school year will be accompanied with new violent student offenders, decided to send their school psychologists to FBI conferences on "student profiling."²³ The conference, focusing on teaching schools to spot troubled children, taught participants how to detect the "warning signs" which may indicate those prone to violence.²⁴ The Department of Education and the National Association of School Psychologists (NASP) published a booklet containing 16 behaviors that may indicate a

¹⁷ See, e.g., Brent E. Turvey, *What is Criminal Profiling?*, KNOWLEDGE SOLUTIONS LLC NEWSPAPER (Apr. 1997), available at <http://www.corpusdelecti.com/KSNL031797.html> (last visited Oct. 20, 1999).

¹⁸ See Alan W. Schefflin, 38 SANTA CLARA L. REV. 1298, (1998) (reviewing CRIMINAL DETECTION AND THE PSYCHOLOGY OF CRIME, (David V. Canter and Lawrence J. Allison eds., date)).

¹⁹ See *id.* at 1300.

²⁰ See *United States v. Mendenhall*, 446 U.S. 544 (1980). Drug Enforcement Agency agents who stopped a black woman at the Detroit Metropolitan Airport because her behaviors fit the drug courier profile were legitimate in doing so. *Id.*

²¹ See American Civil Liberties Union, *ACLU Calls on Congress to Act on Racial Profiling* (Apr. 4, 1999), available at <http://www.aclu.org/news/1999/n041499a.html> (last visited Sept. 13, 1999) (statement of Laura W. Murphy, Director of ACLU Washington National Office). "Driving While Black (or brown)" is a national problem. Stopping drivers simply because of their skin color not only inflicts harm on black and brown communities, but it also hurts all Americans. "Daily fear and humiliation is visited upon people of color who simply wish to do without a second thought what most Americans [want to do] — drive their cars to work, to the grocery store, and to visit families and loved ones." *Id.*

²² See *infra* notes 199–206 and accompanying text.

²³ See Ted Rall, *Someone Isn't Just Like the Other*, LAS VEGAS REV. J., Sept. 12, 1999, at 4D.

potentially dangerous child.²⁵ If a student exhibits any of these characteristics, he/she could be forced to see a therapist, transferred to another school, or even expelled.²⁶

This practice unquestionably invades the privacy of the individual student.²⁷ Adolescence is a growing period fraught with change and often turbulent emotional development.²⁸ Therefore, to force students to abide by a strict set of behavioral guidelines will have detrimental long-term effects for the student. Moreover, the consequences that a "potentially dangerous child" might face will be unsuccessful in preventing future violent acts in the schools.²⁹ Part I of this note addresses the growing problem with juvenile delinquency, specifically focusing on the epidemic of violence in American schools. It also critiques the previous responses that schools have taken to prevent future acts of violence in schools. Part II of this note is a focus on profiling as a phenomenon to deter crime, and reviews the history and evolution of the practice and overview some of the various types of profiles developed as a response to the growing prevalence of violence. Part II also analyzes how the Fourth Amendment has been utilized to justify profiling as a law enforcement technique. Finally, Part II examines the overall effectiveness that profiling has had on curbing violence. Part III discusses the Department of Education's response to juvenile violence in the wake of all of the school shootings and violence. Additionally, this section addresses the FBI's new "student profiling" technique. Finally, the Fourth Amendment is again analyzed, this time with particular attention to the school setting. Part IV weighs the conflicting concerns presented in response to student profiling. This part also highlights the potential pitfalls, including due process concerns that

²⁴ DWYER, ET. AL., U.S. DEP'T OF EDUC., *EARLY WARNING, TIMELY RESPONSE: A GUIDE TO SAFE SCHOOLS* (1998).

²⁵ *See id.*

²⁶ *See School Safety Anti-Violence Efforts Must be Balanced*, Copley News Service, Sept. 22, 1999.

²⁷ *See American Civil Liberties Union, Does Different Mean Deadly? More Fallout from School Shooting* (May 10, 1999), available at <http://www.aclu.org/news/1999/w051099a.html> (last visited Sept. 27, 1999) (noting that "students have a right to free expression").

²⁸ *See id.*

²⁹ *See id.*

adopting the student profiling approach might have for students and consequently for schools. Finally, this Note concludes that student profiling not only unfairly labels students who may have any one of the "violent characteristics," but it also violates a student's right to privacy as afforded by the Bill of Rights to the U.S. Constitution. This Note ultimately determines that student profiling will not be an effective deterrent to crime in American schools.

I. JUVENILE DELINQUENCY: A LOOK INTO THE HISTORY AND SUPREME COURT RESPONSES, AND EFFORTS THAT SCHOOLS HAVE TAKEN THUS FAR TO PREVENT ACTS OF VIOLENCE

A. A Look into the History of Juvenile Delinquency

No one can deny that juvenile crime is a national problem. It is unfortunate to discover that kids, when they should be playing dodge-ball, having sleep-over parties, and participating in extra-curricular activities, are instead, committing acts of violence. Juvenile violent crime arrest rates have soared almost 150 percent since 1967.³⁰ The Office of Juvenile Justice and Delinquency Prevention (OJJDP) reports that in 1997, approximately 2,300 murders (about 12% of all murders) in the United States involved at least one juvenile offender.³¹ Sadly enough, on any ordinary day in 1997, correctional facilities

³⁰ See Kristen Trugman, *Juvenile Criminals Getting Younger; 14 Year Old Faces 2 Murder Charges*, WASH. TIMES, Mar. 15, 1999, at A1. FBI reports indicate that violent crime arrest rates for juveniles increased nationally 143 percent from 1967 to 1996. *Id.*

³¹ Compare Office of Juvenile Justice and Delinquency Prevention, The National Report Notebook (1999), at <http://ojjdp.ncjrs.org/ojstabb/qrrnote.html> (last visited Oct. 27, 1999) with Howard Snyder, *Murders Known to Involve Juvenile Offenders, 1980-1995*, OJJDP Statistical Briefing Book (Sept. 30, 1998), at <http://ojjdp.ncjrs.org/ojstabb/qa051.html> (last visited Oct. 27, 1999) (citing an increase from 1995, where an estimated 2,300 juvenile offenders were implicated in approximately 1,900 homicides). But see HOWARD SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT, U.S. DEPARTMENT OF JUSTICE (Sept. 1999) (citing approximately 1,400 of the 18,200 persons murdered in 1997 were committed by juvenile offenders).

served as home to almost 106,000 juvenile offenders.³² Nevertheless, according to Eric H. Holder, Jr., Deputy Attorney General of the United States, "we are moving in the right direction."³³ Mr. Holder observes that the years 1994-1997 brought significant declines in every type of violent crime index offense committed by juveniles.³⁴ However, he implores the American people not to relax since the juvenile crime rate has risen a debilitating 23% above the 1998 level.³⁵

Because juvenile delinquency has unfortunately become somewhat of a national phenomenon, it is not surprising that it has entered into the walls of the United States Supreme Court.³⁶ The late 1960's brought a "series of landmark cases that dramatically changed the character and procedures of the juvenile justice system."³⁷ The Supreme Court took its first stab at juvenile delinquency proceedings in *Kent v. United States*.³⁸ The Supreme Court, recognized that juvenile delinquency proceedings are technically "civil" rather than "criminal" in nature and historically, minors cannot complain of being deprived of certain important rights only available in criminal cases.³⁹ Despite this, however, the Court concluded that the 16-year old defendant was "entitled to a hearing that measured up to 'the essentials of due process and fair treatment'."⁴⁰ The Supreme Court,

³² See Office of Juvenile Justice and Delinquency Prevention, the National Report Notebook (1999), at <http://ojjdp.ncjrs.org/ojstabb/qnote.html>.

³³ *The Problem of Youth Violence: Before the Senate Appropriations Comm., Subcomm. on Labor, Health and Human Services, and Education* (1999) (prepared statement of Eric H. Holder, Jr., Deputy Attorney General).

³⁴ *Id.*

³⁵ *Id.* (Arrest rates for many other violent and non-violent crimes remain high. Specifically, drug abuse and weapons offenses arrests are up 125% and 44%, respectively).

³⁶ See generally Shannon F. McLatchey, *Juvenile Crime and Punishment: An Analysis of the "Get Tough Approach,"* 10 U. FLA. J.L. & PUB. POL'Y 401 (1999).

³⁷ See Snyder & Sickmund, *supra* note 31.

³⁸ 383 U.S. 541 (1966).

³⁹ *Id.* at 555. Courts have held that minors are not entitled to various constitutional rights such as the right to bail, the right to indictment by grand jury, the immunity against self-incrimination, and the right to counsel. *Id.*

⁴⁰ See Snyder & Sickmund, *supra* note 31 (quoting *Kent v. United States*, 383 U.S. 541 (1966)).

again, in *In re Gault*⁴¹ reaffirmed the notion that courts do not need to provide juveniles with same due process rights as adults.⁴²

B. A Brief Overview of Violence in the Schools

In the past, parents worried that their son or daughter would become prey to a bully who would push him/her around during recess and steal his/her lunch money. That was practically the extent of parents' worries. Now, unfortunately, violence in the schools is all too widespread. The days of safety in our schools have tragically come to an end.⁴³ Kids are no longer just pushing and shoving others around in the courtyard. Not only are students bringing knives, guns, and explosives to schools to threaten, scare, and harm others, but incidentally students are also bringing in these weapons for protection.⁴⁴ Violence in any setting is disturbing, but when it occurs in the schools, it is especially destructive.⁴⁵ Schools have become "'battle zones' for violent and often deadly activities."⁴⁶

With an onslaught of weapon possession in the schools, it is no wonder that the incidence of crime in schools is staggering. During 1996–97, the Department of Education noted that about 4,000 incidents of rape or other types of sexual battery were reported in our nation's public schools.⁴⁷ There were about 11,000 incidents of

⁴¹ 387 U.S. 1 (1967).

⁴² *Id.* at 33.

⁴³ See *Violence in U.S. Schools*, *supra* note 8.

⁴⁴ PHILIP KAUFMAN, ET. AL., U.S. DEPT. OF EDUC., INDICATORS OF SCHOOL CRIME AND SAFETY, (Oct. 1998).

⁴⁵ See Position Statement from National Association of School Psychologists on School Violence (July 14, 1996), available at <http://www.naspweb.org/information.pospaper/violence.html> (last visited Sept. 9, 1999).

⁴⁶ See Stanley Matthew Burgess, *Missouri's Safe Schools Act: An Attempt to Ensure a Safe Education Opportunity*, 66 UMKC L. REV. 603, 604 (1998) (quoting Joan Little, Carnahan Signs Bill on School Violence Records to Follow From School to School, ST. LOUIS POST-DISPATCH, Jan. 25, 1995, at A1). A male student, admitted to attend the school just one day prior, brutally attacked a female student, because the school district had failed to properly screen her attacker's prior school records. *Id.*

⁴⁷ See U.S. Department of Education, *National Center for Education Statistics, Fast Response Survey System, Principal/School Disciplinarian Survey on School Violence*, FRSS 63, 1997 (Oct. 26, 1999), available at <http://nces.ed.gov/pubs98/violence/980300003.html>. These figures may be an

physical attacks or fights in which weapons were used.⁴⁸ In that same year, about 190,000 fights or physical attacks not involving weapons also occurred in schools.⁴⁹ The Department of Education reported that from 1996-1997, approximately 6,100 students were expelled for bringing a firearm to school.⁵⁰ The National Crime Survey reports that "almost 3 million crimes occur on or near school campuses everyday."⁵¹ These statistics are certainly grave enough for some reasonable action to be taken to prevent more instances of school violence from occurring.

Because of the rash of violent incidents that have occurred in schools, it is not surprising that students are afraid to be in school.⁵² Even though statistics cite a decline in school associated violent deaths by a significant 40%, an alarming 50% of people are fearful of their schools.⁵³ Students report that they don't feel safe while they attend school, and while they are going to and from school.⁵⁴ However, what are schools to do? Students certainly do not want to feel like prisoners during school hours.

underestimation; not all incidents are accounted for since some crimes may not be reported to authorities.

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See Fainaru, *supra* note 13 [emphasis added]. This number is thought to be a shockingly low estimate of the number of guns brought into schools that year. Fainaru reports that some estimators believe 270,000 guns are brought to school each day.

⁵¹ T. Nikki Eckland, *The Safe Schools Act: Legal and SDR Responses to Violence in Schools*, 31 URB. LAW. 309, 310 (1999) (citing S.REP. No. 103-180 at 3 (1993)). But see U.S. Secret Service *Safe School Initiative: An Interim Report on the Prevention of Targeted School Violence in Schools* (Oct. 2000) available at <http://www.treas.gov/usss/ntac> (last visited Nov. 10, 2000) at 1. Official statistics show, however, that rates of school violence have "steadily decreased since 1993." However, "several high-profile shootings in schools over the past decade have resulted in increased fear among students, parents, and educators."

⁵² See PHILIP KAUFMAN, ET AL., U.S. DEPARTMENT OF EDUCATION, INDICATORS OF SCHOOL CRIME AND SAFETY (1998). In 1989, 6 percent of students ages 12 through 19 reported that at times they feared being attacked or harmed at school. This percentage increased to 9 percent in 1995. *Id.* Between 1989 and 1995, the percentage of students age 12 through 19 who avoided one or more places at their school due to fear for their own safety also increased from 5 percent to 9 percent. *Id.*

⁵³ See Kim Brooks, et al., *School House Hype: Two Years Later*, 8 JUN KY. CHILDREN'S RTS. J. 7, (2000) (citing statistics between school years 1997-8 and 1998-9).

⁵⁴ See KAUFMAN, ET AL., *supra* note 52.

C. What Schools Have Done So Far to Prevent Future Violent Acts

Concern over school crime has led school administrators to adopt security measures like metal detectors, zero tolerance policies and school uniforms.⁵⁵ Teachers, parents, and administrators are puzzled at how young kids can develop such anger and rage which ultimately leads to violence.⁵⁶ However, it seems that school administrators are willing to try just about any technique that will lead them towards a possible solution in the war against school violence.

Even though efforts have been taken to protect the students in schools, uniformity across the country is lacking.⁵⁷ What one school district commands its students to do, another school district forbids.⁵⁸ But school administrators are not about to sit around, do nothing, and wait for their school to be the next target of violence. Various measures have been taken to help control school violence such as requiring students to carry see-through backpacks while they are in school,⁵⁹ and banning Gothic Clothing and T-shirts relating to Marilyn Manson.⁶⁰

⁵⁵ See *infra* notes 64–118 and accompanying text.

⁵⁶ See *infra* notes 64–118 and accompanying text.

⁵⁷ See ABCNews.com, Jonathan Dube, *Toward Safer Schools: Littleton Shooting Revises Security Questions*, (Oct. 20, 1999), at http://www.abcnews.go.com/sections/us/DailyNews/littleton_schoolsecurity042999.html.

⁵⁸ See *e.g. id.* “In New Mexico, a school has bolted its lockers, forcing kids to carry their backpacks all day. In Buffalo, another school has done the opposite, requiring students to leave their bags in lockers. And in West Palm Beach, a school just banned book-bags altogether”. *Id.*; see also Ruth S. Intress, *Study: Youth Violence Efforts Inadequate*, RICHMOND TIMES, July 23, 1999, at B5 (indicating that the University of Virginia conducted a statewide study and determined that while juvenile violence is being addressed by many different programs, there is no “centralized system [that] exists to...measure the effectiveness . . .”).

⁵⁹ See Wang, *supra* note 14. The backpack requirement will discourage students from bringing a weapon to school that they feel could be concealed in a dark, opaque backpack. However, some experts contend that this practice will not prevent students from bringing in weapons who are determined to do so. *Id.*

⁶⁰ See Wang, *supra* note 14. The two “alleged” Columbine shooters, Dylan Klebold and Eric Harris reportedly wore Goth-like clothing during the shooting. Goths prefer to wear dark clothing, skull and cross-bone shirts, and paint their fingernails black. Marilyn Manson, “an androgynous rock singer . . . uses makeup and wigs to distort himself in . . . scar[y] ways . . .” *Id.*

Some attempts at security have been effective in deterring crime.⁶¹ However, even though, a security measure might appear to prevent crime, the plan still needs to stand up to constitutional muster. Schools, though, fall under the category of searches upheld under "special needs."⁶² Therefore, a balancing test is applied to weigh the need for the search against the degree of invasion upon the student's privacy.⁶³

1. Metal Detectors

The rash incidents of violence that have occurred over the past few years have provided the impetus to install metal detectors in the schools. A majority of the largest school districts have opted for just that.⁶⁴ Metal detectors in schools assert two objectives: 1) to discover weapons and 2) to prevent weapons from being carried onto school grounds.⁶⁵ Until recently, metal detectors were rarely found in the public schools.⁶⁶

⁶¹ Metal detectors can aid in preventing students from bringing weapons inside the school. However, metal detectors are not effective in preventing fights in areas where there are no metal detectors, such as parking lots and school yards. See James Schreiner, *Views on Preventing School Violence*, SUNDAY NEWS (LANCASTER, PA), Dec. 26, 1999, at A4. Metal detectors are also ineffective where "a kid pull[s] a fire alarm [and] shoot[s] their classmates as they're exiting the building." See Deborah Mathis, *Many Efforts to Deter School Violence Worthless, Experts Say*, GANNETT NEWS SERVICE, Dec. 7, 1999, at ARC.

⁶² See STEPHEN A. SALTZBURG ET AL., *AMERICAN CRIMINAL PROCEDURE* 299 (5th ed. 1996).

⁶³ See *id.*

⁶⁴ See Eckland, *supra* note 51 ("Seventy percent of the fifty largest school districts have installed metal detectors to prevent gun and weapon possession of school grounds. Along with these tangible safety measures usually come law enforcement personnel to operate the detectors and cameras. Such personnel are also used to perform occasional locker searches for weapons and drugs"). See e.g. Cindy Rodriguez, *Local Communities Grapple with Issues Raised by Colo. Tragedy; Parents, Teachers Face Questions over Safety*, BOSTON GLOBE, May 2, 1999, at B1. ATD-American Co., a metal detector company, has been sending information to schools. The cost of a hand-held device begins at \$27.90, and a walk-through detector costs \$3,498. *Id.*

⁶⁵ See *People v. Pruitt*, 662 N.E.2d 540 (Ill. 1996).

⁶⁶ See Michael Ferraraccio, *Metal Detectors in the Public Schools: Fourth Amendment Concerns*, 28 J.L. & EDUC. 209, 217, (Apr. 1999). The use of metal detectors is a fairly recent innovation. *Id.* However, a 1994 survey reported that 15% of high

While the Supreme Court has never ruled on whether metal detectors are constitutional, lower courts have held that metal detectors do not violate students' Fourth Amendment rights.⁶⁷

In order to conduct a search, the Supreme Court has held in favor of a "per se" warrant rule.⁶⁸ Although warrantless searches are, therefore, deemed unreasonable,⁶⁹ the Court has "carved out exceptional cases involving special governmental needs."⁷⁰ In *Griffin v. Wisconsin*, the Supreme Court confirmed that "'supervision' constitutes a special need which would justify 'a degree of infringement upon privacy'."⁷¹ For that reason, warrantless searches for weapons in schools furnishes a substantially stronger need in preserving school safety than in maintaining students' right to privacy.⁷²

schools use some form of a metal detector. See *Metal Detectors in High School*, at <http://www.altculture.com> (last visited Jan. 23, 2000).

⁶⁷ See *People v. Dukes*, 580 N.Y.S.2d 850 (N.Y. City Crim. Ct. 1992) (upholding the constitutionality of a metal detector search at a New York City school). See also, *In re Latasha W.* 70 Cal.Rptr.2d 886 (1998) (holding that random metal detector weapon searches of high school students did not violate the Fourth Amendment ban on unreasonable searches and seizures); *In re F.B.* 442 Pa. Super. 216 (1995) (holding that a routine search in which all students were scanned by metal detectors as they entered the school was reasonable). See also U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized").

⁶⁸ *Johnson v. United States*, 333 U.S. 10 (1948) ("The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judge by the officer engaged in the *often competitive enterprise of ferreting out crime* [emphasis added]").

⁶⁹ Various scenarios allow for a "warrantless" search. See *Arizona v. Hicks*, 480 U.S. 321 (1987) (items in plain view), *U.S. v. Robinson*, 414 U.S. 218 (1973) (search incident to arrest), *Warden v. Hayden*, 387 U.S. 294 (1967) ("hot pursuit" doctrine).

⁷⁰ Joan E. Imbriani, *Metal Detectors in Public Schools: A Subtle Sacrifice of Privacy Interests*, 6 SETON HALL CONST. L.J. 189 (1995). See also SALTZBURG ET AL., *supra* note 62 (stating that once the search is supported by special needs, the Court applies a balancing test whereby it balances the need for the particular search against the degree of invasion upon the person's privacy).

⁷¹ 483 U.S. 868 (1987).

⁷² See Ferraraccio, *supra* note 66 at 219 (quoting *In re F.B.*, 658 A.2d 1378 at 1380).

Although it is well settled that schools may use metal detectors, they are subject to some restrictions.⁷³ First, school officials must be able to point to a documented, serious problem of gun violence in their schools.⁷⁴ Second, schools must use metal detectors in a random fashion.⁷⁵ Schools may not just search the male students or just the female students. Schools may search all people that enter the school grounds, or use some other neutral category, such as searching every other student.⁷⁶ Finally, the use of metal detectors can only be justified in their search for weapons.⁷⁷

Reactions from students show little objection to metal detector searches.⁷⁸ Obviously, metal detectors are providing students with a sense of security during school hours.⁷⁹ A minor invasion of privacy is certainly an insignificant trade-off for feeling safe in schools.⁸⁰ According to an ABCNEWS/*Washington Post* poll, 50 percent of students admitted that they thought schools should make the students pass through metal detectors.⁸¹ As one student proclaims, “[i]t doesn’t feel like a prison because we know they’re just trying to keep us safe.”⁸²

⁷³ See U.S. DEPARTMENT OF EDUCATION, CREATING SAFE AND DRUG FREE SCHOOLS: AN ACTION GUIDE (1996) available at <http://www.ed.gov>.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.* However, during the course of a routine search for weapons, if any other contraband is uncovered by either the plain view doctrine, or the plain touch doctrine, then that contraband can be seized as well. See *e.g.* *Minnesota v. Dickerson*, 508 U.S. 336 (1993), and *Arizona v. Hicks*, 480 U.S. 321 (1987).

⁷⁸ Georgia’s Secretary of State, Cathy Cox, announced that 56.3% of students voted in favor of passing through metal detectors before entering their school. See Cathy Cox, Georgia Secretary of State, *Secretary Cox: Georgia Civics Day Student Voters Say Yes to Metal Detectors, Voting and Manners Instruction—No to School Uniforms*, Nov. 1, 1999, available at <http://www.sos.state.ga.us/pressrel/pr991101.htm> (last visited Jan. 23, 2000). A school psychologist notes that metal detectors “can help, and they might stop a kid from bringing a gun to school.” See *TODAY’S SCHOOL PSYCHOLOGIST*, Dec. 16, 1999, at 5.

⁷⁹ See Cox, *supra* note 78.

⁸⁰ See Cox, *supra* note 78.

⁸¹ See Dube, *supra* note 57.

⁸² See Dube, *supra* note 57.

2. Zero-tolerance⁸³ rules:

When President Clinton signed the “Gun-Free School Zone Act,”⁸⁴ he also issued a Presidential Directive to enforce “zero tolerance” for guns in schools.⁸⁵ He mandated that “if a student brings a gun to school, that student will be expelled for a year.”⁸⁶ Regardless of the mitigating circumstances that the student might have for bringing the gun onto school property, i.e. that the student brought the gun in for “show and tell,” that student would suffer the consequences.⁸⁷ The Department of Education reports that most public schools have zero tolerance policies for student offenses.⁸⁸ An institutional policy like this evinces a school’s pledge and dedication to violence prevention. Zero-tolerance also helps to maintain a safe and peaceful school environment.

⁸³ See Kaufman et al. *supra* note 52, at 121. This type of plan is defined as a “school or district policy that mandates predetermined consequences or punishments for specific offenses.”

⁸⁴ 18 U.S.C. §922(q) (2000).

⁸⁵ See *infra* p. 14 and note 93. Every state has adopted a zero tolerance law that compels school districts to expel students who bring a gun to school for at least a year. See Jessica Portner, Education Week on the Web, *Zero-Tolerance Laws Getting a Second Look* (Mar. 26, 1997), available at <http://www.edweek.org> (last visited Oct. 28, 1999).

⁸⁶ See Portner, *supra* note 85.

⁸⁷ See Felicia Demchuck, *Joking about Weapons Doesn’t Fly at Airports and Shouldn’t at School*, PLAIN DEALER (Cleveland), Nov. 30, 1999, at 8B. One school administrator goes as far as enforcing a zero tolerance policy on “comment[s], even as a joke.” *Id.*

⁸⁸ See Gov. Bill Graves, Office of the Governor Weekly Column, *Zero Tolerance to Ensure Safe Schools* (June 28, 1998), available at <http://www.state.ks.us/public/governor/pledge/initiative/htm> (“At least 9 out of 10 schools reported zero tolerance policies for firearms (94 percent) and weapons other than firearms (91 percent). Eighty seven percent of schools had policies of zero tolerance for alcohol and 88 percent had zero tolerance policies for drugs. Most schools also had zero tolerance policies for violence and tobacco (79 percent each).” See also Portner, *supra* note 85 (“From 1994, every state has enacted a zero-tolerance policy, which would command school districts to expel students who bring a gun to school. This step complies with “the 1994 federal gun-free-schools law that requires every state to pass such legislation or forfeit federal education aid”).

Zero-tolerance, though, has its critics.⁸⁹ First, some claim that this policy does not work since “only 1 percent of kids who carry a gun to school get caught and expelled.”⁹⁰ The NASP contends that this type of policy focuses only on catching and punishing violent behaviors.⁹¹ Therefore, it fails to satisfy the long-range goal of creating a safe school environment.⁹² Furthermore, the National Center for Education reports that there is no strong evidence linking zero-tolerance policies with decreased school violence incidents.⁹³ Finally, if given the chance to interpret the policy on a case by case basis, there is evidence that school administrators may discriminate against certain students.⁹⁴ Teachers may pay special attention to certain types of students, while leaving others alone. Ultimately, some students might be favored over others.

3. School Uniforms

The Department of Education has encouraged schools to adopt school uniform policies to help keep schools safe.⁹⁵ School uniforms

⁸⁹ See, e.g., *Jesse Jackson's Wrong Target*, THE ECONOMIST NEWSPAPER LTD., Nov. 27, 1999, at. Reverend Jesse Jackson notes that “zero tolerance not only ensures that children who make the normal mistakes of childhood are lumped together with hard-core delinquents, [but] [I]t also ignores the all-important question of what happens to offenders after they have been expelled.” *Id.* See also *infra* pp. 14–15 and notes 90–94. But see Stephanie Banchemo, *Expelled, But not without Hope; Alternative Schools Gives 2nd Chance to Troubled Kids*, CHI. TRIB., Nov. 25, 1999, at N1. Rather than expelling a student for bringing a knife to school, the district enrolled him in a state-funded alternative school for troubled students. *Id.*

⁹⁰ See Deborah Mathis, *Many Efforts to Deter School Violence Worthless, Say Experts*, GANNETT NEWS SERVICE, Dec. 7, 1999 (Paul Kingery of the Hamilton Fish Institute in Washington, D.C. claims that zero tolerance is a myth, it “makes kids more afraid” and “angrier”).

⁹¹ See Position Statement from National Association of School Psychologists on School Violence (July 14, 1996), at <http://www.naspweb.org/information.pospaper/violence.html> (last visited Sept. 9, 1999).

⁹² *Id.*

⁹³ See Portner, *supra* note 85.

⁹⁴ See Portner, *supra* note 85 (“‘When you make exceptions or treat each child individually, you create an elitist policy,’ under which a child from a wealthy family might be unpunished and a troublesome child from a poor family might get the maximum penalty,” contends the president of a Louisiana school board”).

⁹⁵ See U.S. Department of Education, *What is the Department of Education doing to Help Americans Keep Schools and Communities Safe?* (Apr. 30, 1999), available

are thought to possess such benefits as promoting school safety, improving discipline, and enhancing the learning environment.⁹⁶ Therefore some school districts have decided to police what their students are wearing to school in an attempt to control school violence.⁹⁷ To do so, various schools have implemented a mandatory dress code into their curriculum.⁹⁸ Because a lot of school violence is related to gang membership,⁹⁹ schools have developed dress codes that prohibit students from wearing clothing that is identifiable as gang clothing.¹⁰⁰ Requiring students to wear uniforms is “thought to increase students’ commitment to school goals and to reduce theft of expensive clothing and jewelry.”¹⁰¹ Furthermore, once violence is removed as a threat, students will feel less intimidated at school, and can continue to focus on education.¹⁰²

An example of such an effort to impose dress code regulation occurred recently in New Hampshire. With the eruption of school violence in her district of Portsmouth, the superintendent decided to ban Gothic clothing.¹⁰³ Her reason for such a ban was that the two students implicated in the Columbine High School massacre allegedly

at <http://www.ed.gov/offices/OESE/SDFS/edresp.html>. The Department of Education has noted that school uniforms have been found to be an effective strategy in reducing violence in the schools. By promoting discipline and respect, schools will assist in advancing healthy childhood development. *Id.*

⁹⁶ See U.S. DEPARTMENT OF EDUC. *supra* note 73. Other benefits include: decreasing violence and theft among students over designer clothing or expensive shoes, helping prevent gang member from wearing gang colors and insignia at school, helping school officials recognize intruders who come to the school, and helping student resist peer pressure. *Id.*

⁹⁷ See, e.g., Lisa Kozleski, *Pennridge School Board Discusses Student Uniforms: Several Directors Suggest They Might Restore Order to Classrooms*, ALLENTOWN MORNING CALL, May 12, 1999, at B13.

⁹⁸ *Id.*

⁹⁹ See Daniel, *supra* note 9.

¹⁰⁰ See Amy Mitchell Wilson, *Public School Dress Codes: The Constitutional Debate*, 1998 B.Y.U. EDUC. & L. J. 147 (1998). Some typical gang related clothing includes bandanas, particular colored handkerchiefs, college jackets, baggy clothing, earrings and accessories. *Id.*

¹⁰¹ See Wendy Schwartz, Eric Clearinghouse on Urban Education, *An Overview of Strategies to Reduce School Violence* (Oct. 1996), at <http://eric-web.tc.columbia.edu/digests/dig115.html>.

¹⁰² See Daniel, *supra* note 9.

¹⁰³ See Rodriguez, *supra* note 64.

wore Gothic clothing.¹⁰⁴ Her hasty decision to ban this type of clothing received harsh criticism from the students. One eighth grade student stated, “[i]t’s not the clothes that influence a person. If someone thinks Hitler is God, they’re psychotic. It doesn’t have anything to do with their clothes.”¹⁰⁵

There still remains evidence of positive feedback with regard to school dress codes. For one, educators have reported that dress codes have been effective in reducing violence in schools.¹⁰⁶ Furthermore, assertions are made that dress codes improve student self-esteem and ameliorate the educational environment by encouraging discipline.¹⁰⁷ Certainly, if students eliminate the need to impress other peers with their clothing, they can turn their attention back to their studies. School uniforms also neutralize the disparate socio-economic class stigmas by making poorer students less distinguishable from wealthier ones.¹⁰⁸

With clear and definite reactions to dress codes, one would think that they are here to stay. Nevertheless, the issue of dress codes is not devoid of controversy.¹⁰⁹ There is no certainty regarding the effectiveness of dress codes as a deterrent to school violence.¹¹⁰ Other opponents of dress codes argue against its constitutionality.¹¹¹ Dress codes have been challenged as a violation of students’ right to control their own appearance, speech and expression.¹¹² A student may claim

¹⁰⁴ See Rodriguez, *supra* note 64. Superintendent Suzanne Schrader ultimately changed her position and overturned the initiated ban on Gothic clothing in her school district. *Id.*

¹⁰⁵ See Rodriguez, *supra* note 64.

¹⁰⁶ See Wilson, *supra* note 100.

¹⁰⁷ See Wendy Mahling, *Secondhand Codes: An Analysis of the Constitutionality of Dress Codes in the Public Schools*, 80 MINN. L. REV. 715, (1996).

¹⁰⁸ See *Let Parents Decide*, THE TENNESSEAN, June 14, 1999, at 14A.

¹⁰⁹ ACLU Press Release, *See School Uniforms Cause Dissent at Boston High School* (May 17, 1997), at <http://www.aclu.org/news/n051797a.html>. A school uniform policy in one Boston school has created widespread student discord. John Robert of the Massachusetts ACLU offered that dress “is an issue of person freedom, [and that s]uch decisions should reside with students and their families.” *Id.*

¹¹⁰ See Wilson, *supra* note 100.

¹¹¹ See Wilson, *supra* note 100. See also *Let Parents Decide*, *supra* note 108 (“Yes, school uniforms tend to equalize students, making poor ones less distinguishable from rich ones. But they also eliminate an age-long form of self expression.”).

¹¹² See Mahling, *supra* note 107.

First Amendment protection,¹¹³ namely the right to free expression, when the codes are enacted in response to school violence. However, “a student’s expression cannot be limitless.”¹¹⁴ With regards to gang membership, the particular message that clothing sends may be perceived differently depending upon whom is viewing the article of clothing.¹¹⁵ Some may view one’s clothing and receive the message of fear and intimidation, while others may view such expression as a challenge to engage in a violent encounter.¹¹⁶ Nonetheless, as with metal detector searches of students,¹¹⁷ school districts are given latitude to police their students.

To conclude, the efforts that school districts have taken so far to safeguard their schools from becoming another violence victim have been successful.¹¹⁸ When a school involves the students in creating a solution, results will be favorable. However, students don’t want to be told what to do, what to think, and how to act. Students want to be able to flourish, independent of excessive rules and demands.

¹¹³ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”).

¹¹⁴ *Spence v. Washington*, 418 U.S. 405 (1974) (pronouncing a two-part test for constitutional, free speech protection. In the first prong of the test, the person claiming constitutional protection must show that his/her conduct was “intended to convey a particularized message.” The second prong announces that the “likelihood [must be] great that the message would be understood by those who viewed it”). See also Daniel, *supra* note 9.

¹¹⁵ See Wilson, *supra* note 100.

¹¹⁶ See Daniel, *supra* note 9.

¹¹⁷ See *supra* notes 70–77 and accompanying text. See also Allison M. Barbarosh, *Undressing The First Amendment in Public Schools: Do Uniform Dress Codes Violate a Students’ First Amendment Rights?*, 28 LOY. L.A. L. REV. 1415, 1424 (1995) (“To maintain that students are secure while in school, school districts are given considerable discretion with regards to the measures taken to ensure that the environment is safe and favorable to learning”).

¹¹⁸ The U.S. Department of Education has reported that school crime has decreased 20 percent over the last three years. See ABCNews.com, *Is Fear of Violence Turning Schools into Prisons?* (Oct. 20, 1999), at <http://www.abcnews.com>. (The Department of Education also reports that in 1998, approximately one-third fewer students are being expelled for bringing guns to school than in 1997). Furthermore, during the 1998-1999 school year, schools fatalities decreased to 25, as opposed to 54 deaths in the 1993-1994 school year. *Id.*

II: PROFILING: THE PHENOMENON TO DETER CRIME

A. How did Profiling Start?

For as long as crime has been in existence, there have been efforts directed at trying to prevent and control it.¹¹⁹ Therefore, it only follows that if there were no difficulties in managing crime, there would be no crime to control. Since the beginning of time, criminologists and other specialists have tried to predict criminal behavior based on the existence of "certain deviant characteristics."¹²⁰ One of the more popular and successful ways to predict violent criminal behavior is through the use of profiling.¹²¹

Generally, profiling is a deductive process.¹²² It commences with an attentive and careful analysis of individual crime scenes.¹²³ After the initial analysis, the evidence recovered is used to explain the behaviors and inducements of specific criminal behaviors.¹²⁴ Several important advantages are gained from profiling. Profiling can aid in defining a narrow set of suspects.¹²⁵ This set of suspects will help eliminate those that do not satisfy the suspect characteristics. Second, profiling can act as an effective investigative tool.¹²⁶ Once a suspect pool is developed, law enforcement officials can target their investigation towards a tighter strain of potential criminals.¹²⁷ The

¹¹⁹ See, e.g., Lawrence W. Sherman et al., *Preventing Crime: What Works, What Doesn't, What's Promising*, A REPORT TO THE UNITED STATES CONGRESS (Feb. 7, 2000), available at <http://www.ncjrs.org/work/index/html>.

¹²⁰ See Charles L. Becton, *The Drug Courier Profile: 'All Seems Infected that Th' Infected Spy, as All Looks Yellow to the Jaundic'd Eye*, 65 N.C.L. REV. 417, 423 (1987).

¹²¹ See *id.*

¹²² See Turvey, *supra* note 17.

¹²³ See Turvey, *supra* note 17.

¹²⁴ See Turvey, *supra* note 17.

¹²⁵ See Turvey, *supra* note 17. See also, James Alan Fox & Jack Levin, *Multiple Homicide: Patterns of Serial or Mass Murders*, 23 CRIME & J. 407 (1998) ("Profiles are intended as a tool to focus on a range of possible suspects rather than to point precisely to one particular suspect.") *Id.*

¹²⁶ See Turvey, *supra* note 17.

¹²⁷ See Fox & Levin, *supra* note 125.

FBI has been very successful in using profiling to detect numerous classes of offenders.¹²⁸

*B. Profiling and the Fourth Amendment*¹²⁹

The Fourth Amendment was drafted to protect individuals from unreasonable government intrusions.¹³⁰ This protection is true with regard to profiles used as a law enforcement technique.¹³¹ A governmental intrusion is deemed unreasonable when it interferes with a person's reasonable expectation of privacy.¹³² The Supreme Court has consistently held that a search or a seizure is unreasonable if it lacks probable cause.¹³³ In *Illinois v. Gates*, the Court defined probable cause as "a fair probability that contraband or evidence of a crime will be found."¹³⁴ Keeping that definition in mind, however, the Court has still acknowledged great flexibility with respect to the probable cause requirement of the Fourth Amendment.¹³⁵

Profiling is one method that law enforcement officials often utilize to determine whether someone's conduct is sufficiently suspicious to justify stopping him or her.¹³⁶ To stop a person because he/she fits a particular profile, the Court insists on applying the reasonable suspicion analysis, based on articulable facts.¹³⁷ This

¹²⁸ See Fox & Levin, *supra* note 125.

¹²⁹ U.S. CONST. amend. IV.

¹³⁰ See Angela Anita Allen-Bell, *The Birth of Crime: Driving While Black (DWB)*, 25 S.U. L. REV. 195 (1997).

¹³¹ See *Florida v. Royer*, 460 U.S. 491 (1983).

¹³² See *Katz v. United States*, 389 U.S. 347 (1967). The "fourth amendment protects individual privacy against certain kinds of governmental intrusions." *Id.*

¹³³ See *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (holding arrest based on "vague suspicion" is unlawful).

¹³⁴ 462 U.S. 213, 238 (1983).

¹³⁵ See *Brinegar v. United States*, 338 U.S. 160, 175 (1949). "[Probable cause] . . . deal[s] with probabilities [which] . . . are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." See also *Ornelas v. United States*, 517 U.S. 690, 695 (1996) ("Articulating precisely what reasonable suspicions and probable cause mean is not possible."); Allen-Bell, *supra* note 130.

¹³⁶ See *Mendenhall*, 446 U.S. 544 (1980).

¹³⁷ See *Terry v. Ohio*, 392 U.S. 1 (1968)

standard was first articulated in *Terry v. Ohio*.¹³⁸ Mere hunches, even though based on good faith, are simply not enough.¹³⁹ The police officer must be able to point to clear facts that would reasonably lead the officer to believe that an intrusion upon an individual is warranted.¹⁴⁰ To justify an intrusion based on less than probable cause, one must weigh the legitimate governmental purpose against the intrusion to the individual.¹⁴¹ This balancing test weighs the grave danger that police officers are exposed to every day when they approach individuals against the often minor inconvenience that the individual incurs from a "pat down."¹⁴²

The Supreme Court has articulated three different situations in which a person may or may not be "seized" for purposes of the Fourth Amendment. First, an encounter arises when an individual is "free to leave" and not obligated to answer the police officer's questions.¹⁴³ In

¹³⁸ See *id.* at 30–31. In this landmark decision, Chief Justice Warren wrote for the majority and held that:

where a police officer observes unusual conduct which leads him *reasonably* to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. *Such search is reasonable under the Fourth amendment . . .* [emphasis added]. *Id.*

See also Irene Dey, Drug Carrier Profiles, An Infringement of Fourth Amendment Rights, 28 U. BALT. L.F. 3. (1998).

¹³⁹ See *Terry*, 382 U.S. at 22.

¹⁴⁰ See *id.* at 21.

¹⁴¹ See Allen-Bell, *supra* note 130.

¹⁴² See *Terry*, 382 U.S. at 10–11.

¹⁴³ This minor intrusion is not considered to be an unlawful seizure since the individual has the right to refuse to answer the police officer's questions. See *Mendenhall*, 446 U.S. 544 (1980) ("[A] person is seized [within the meaning of the Fourth Amendment] when his freedom of movement is restrained by means of physical force or a show of authority").

an encounter, no seizure occurs.¹⁴⁴ The second situation arises when a person is “stopped” and not free to leave.¹⁴⁵ Finally, the third situation arises when an individual is arrested and placed into custody.¹⁴⁶ These three doctrines, encounter, stop and arrest, can be explained further using *Terry* analysis. The Court has allowed law enforcement officials to stop a person and detain him briefly for questioning if the officer reasonably believes that criminal activity is “afoot.”¹⁴⁷ Following that initial stop, if the officer has a reasonable suspicion that a particular individual may be armed, then the officer is justified to “frisk” the person for weapons.¹⁴⁸ Finally, if the stop and frisk leads to probable cause to believe that the person has committed a crime, then the officer is authorized to arrest the person and to conduct a complete and thorough search incident to that lawful arrest.¹⁴⁹

C. Drug Courier Profiles

A variety of profiles have been created to investigate specific criminal behaviors. The following is not an exhaustive list of profiles: the battering parent profile,¹⁵⁰ the stolen car profile,¹⁵¹ the alien

¹⁴⁴ See *id.*

¹⁴⁵ See *Florida v. Bostick*, 111 S.Ct. 2382, 2384 (1991) (The Fourth Amendment “permits police officers to approach individuals randomly in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate”).

¹⁴⁶ See *Royer*, 460 U.S. 491 (1983). The defendant had been stopped without reasonable suspicion. At some point during the purported consensual encounter, the defendant was not reasonable free to leave. *Id.*

¹⁴⁷ See *Terry*, 392 U.S. at 30.

¹⁴⁸ *Id.* The frisk is warranted to ensure the officer’s own safety.

¹⁴⁹ *Id.*

¹⁵⁰ See *Becton*, *supra* note 120 (citing the testimony of Dr. Bensel in *State v. Loebach*, 310 N.W. 2d 58 (Minn. 1981). “[T]he ‘battering parent’ syndrome is an ‘inner [sic] generational phenomena’ in that adults who abuse their children were often abused themselves . . . [A]busing parents frequently experience role reversal and often expect their children to care for them . . . [B]attering parents often exhibit similar characteristics, such as low empathy, a short fuse, low temper, short temper, low boiling point, high blood pressure, strict authoritarianism, uncommunicativeness, low self-esteem, isolation, and lack of trust”).

smuggler profile,¹⁵² and the marijuana grower profile.¹⁵³ One of the more effective law enforcement tools aimed at detecting the possession and trafficking of illegal drugs has been the drug courier profile.¹⁵⁴

Drug courier profiles were developed in the early 1970s in an effort to combat the overwhelming presence of drugs in the United

¹⁵¹ See *id.* (citing *United States v. Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975)). There, "the government argued that reasonable suspicion for a stop existed because: (1) a man appeared to be Mexican, (2) was driving towards Nogales on a highway from Tucson, (3) in a new-appearing late-model Ford LTD, (4) with Sonora, Mexico license plates; in addition, (5) each week some, but less than 30, late model Ford LTD's are stolen in the Tucson and Phoenix areas and remained unrecovered, and (6) some of those cars turn up in Mexico").

¹⁵² See *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (citing that the Border Patrol's only reason for stopping defendant's car was that the three people in the car were Mexican. The Court recognized that there was a governmental interest in effectively patrolling the United States/Mexico territory).

¹⁵³ See Dey, *supra* note 138.

The profile includes the following: occupants of homes subscribe to HIGH TIMES magazine, indoor gardening equipment from companies that advertise in HIGH TIMES, outbuildings have electrical lines connected to the house, utility company records reveal unusually high wattage in past months compared to neighbors, surveillance does not indicate any large machinery that might use an increased amount of electricity, whether suspects failed to complain to utility company about previous excessive bills, suspects have a criminal record, suspects have large dogs, may be receiving shipments of hydroponic growing equipment...receive mail, especially boxes under a fictitious name, known to be unemployed . . . blanket covered windows, infrared sensing devices measure surface waste heat emanating from the house, suspicious people visiting at all times during the day and night . . . *Id.*

¹⁵⁴ The Drug Enforcement Agency does not keep statistical data of the percentage of people stopped pursuant to a drug courier profile that actually possess drugs, although some statistics have been developed. See Jodi Sax, *Drug Courier Profiles, Airport Stops and Inherent Unreasonableness of the Reasonable Suspicion Standards After U.S. v. Sokolow*, 25 LOY. L.A. L. REV. 321 (Nov. 1991). However, case law does support the effectiveness of drug courier profiles. See, e.g., *United States v. Cordell*, 723 F. 2d 1283, (noting that the use of stop at Chicago's O'Hare airport led to 6-12 stops per day and upwards of 30% of drugs seized pursuant to the stops) *cert. denied*, 465 U.S. 1209 (1983).

States.¹⁵⁵ The two main objectives are to intercept drugs at their point of entry and to disrupt transportation networks of major drug trafficking organizations.¹⁵⁶ By stopping the infusion of drugs, the government is able to save time and money; it can conduct one bulk seizure of drugs rather than stopping many people who might possess smaller amounts of drugs.¹⁵⁷ While no standardized drug courier profile exists, law enforcement agencies strive to identify drug couriers by using the same general characteristics.¹⁵⁸ In *United States v. Elmore*, the Fifth Circuit cited seven primary characteristics and four secondary characteristics of drug couriers.¹⁵⁹ The "*Elmore*" profile has gained widespread popularity with law enforcement agents.¹⁶⁰ Since approaching a person based upon a drug courier profile is considered to be a "seizure" for the purpose of the Fourth Amendment,¹⁶¹ the *Terry* analysis is applicable.¹⁶²

The method in which a law enforcement official utilizes a drug courier profile to detect criminal activity was typified in *United*

¹⁵⁵ See Dey, *supra* note 138 at 3.

¹⁵⁶ See *supra* note 138, at 4.

¹⁵⁷ See *supra* note 138.

¹⁵⁸ See *supra* note 138 at 3.

¹⁵⁹ 595 F.2d 1036, 1039 n. 3 (5th Cir. 1979) cert. denied, 447 U.S. 910 (1980)

The seven primary characteristics are: (1) arrival from or departure to an identified source city; (2) carrying little or no luggage, or large quantities of empty suitcases; (3) unusual itinerary, such as rapid turnaround time for a very lengthy airplane trip; (4) use of an alias; (5) carrying unusually large amounts of currency in the many thousands of dollars, usually on their person, in briefcases or bags; (6) purchasing airline tickets with a large amount of small denomination currency; and (7) unusual nervousness beyond that ordinarily exhibited by passengers. . . . The secondary characteristics are (1) the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport; (2) immediately making a telephone call after deplaning; (3) leaving a false or fictitious call-back telephone number with the airline being utilized; and (4) excessively frequent travel to source or distribution cities.

Id.

¹⁶⁰ See Michael R. Cogan, *The Drug Enforcement Agency's Use of Drug courier Profiles: One Size Fits All*, 41 CATH. U. L. REV. 943 (1992).

¹⁶¹ See Dey, *supra* note 138 at 3.

¹⁶² See *supra* notes 143-149 and accompanying text.

States v. Mendenhall.¹⁶³ There, the Drug Enforcement Agency (DEA) observed the defendant arrive at the Detroit Airport on a flight from Los Angeles.¹⁶⁴ The DEA agents suspected the defendant was a drug courier.¹⁶⁵ They approached the defendant, identified themselves to her as DEA agents, and asked to see her identification and ticket.¹⁶⁶ After the defendant nervously produced such items, which were in different names, the DEA agents asked her to accompany them back to an office for further questions.¹⁶⁷ The defendant followed them to the office and then consented to a search of her person and her handbag.¹⁶⁸ The search revealed drugs.¹⁶⁹ The Supreme Court applied the principles in *Terry* and determined the DEA agents were justified in using a profile to conduct an investigatory stop.¹⁷⁰

¹⁶³ 446 U.S. 544 (1980).

¹⁶⁴ *See id.* at 547

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

¹⁶⁷ *See id.* at 548.

¹⁶⁸ *See Mendenhall*, 446 U.S. 544 (1980).

¹⁶⁹ *See id.* at 555

([N]o seizure of the respondent [when she was first approached in the airport]. The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest).

See also id. at 554 ("A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

¹⁷⁰ *See id.* at 547 n. 1 (At trial, the DEA agent testified that defendant's behavior fit the drug courier profile).

D. Effectiveness of Drug Courier Profiling

This law enforcement practice has led to a significant amount of litigation, particularly with respect to whether police officers were justified in approaching an individual who fit the profile.¹⁷¹

A search procedure may be a necessary security measure and relatively insignificant to an individual. Nevertheless, if the search procedure is not fundamentally effective in achieving the particular goal the procedure was meant to attain, it will be deemed unreasonable.¹⁷² A profile cannot automatically replace the reasonable suspicion that *Terry* requires to validate a "stop."¹⁷³ As Chief Justice Rehnquist points out, profiles "have a chameleon-like way of adapting to any particular set of observations."¹⁷⁴ Other opponents of profiling, like the American Civil Liberties Union (ACLU) emphatically contend that profiling is not effective and will invade privacy.¹⁷⁵ Individual privacy rights are violated when people, who are not engaging in criminal activity, are subjected to unreasonable governmental intrusion.¹⁷⁶

One of the main arguments against drug courier profiling is that "DEA agents use profile characteristics as a substitute for judgment."¹⁷⁷ In this capacity, law enforcement agents may approach an entirely innocent person simply because the person fits the profile.¹⁷⁸ Without any articulable suspicion towards a person, other than the fact that the individual shares similar characteristics to drug

¹⁷¹ See, e.g., *Mendenhall*, 446 U.S. 544 (1980); *Bostick*, 111 S.Ct. 2382 (1991).

¹⁷² See *United States v. Skipwith*, 482 F.2d 1272 (5th Cir. 1973).

¹⁷³ See Donna Smith, *Passenger Profiling: A Greater Terror than Terrorism Itself?*, 32 J. MARSHALL L. REV. 167 (1998).

¹⁷⁴ *United States v. Sokolow*, 490 U.S. 1, 13 (1989).

¹⁷⁵ See ACLU News Wire, *Profiling Endangers Privacy*, at <http://www.aclu.org/news/w100996b.html> (last visited Nov. 2, 1999). See also Smith, *supra* note 173.

¹⁷⁶ U.S. CONST. amend. IV. See also Cogan, *supra* note 160 citing *Terry v. Ohio*, 392 U.S. 1 (1968) ("[*Terry*] limited the enigma of governmental encroachment on individual liberties, and was intended to prevent broad and overreaching law enforcement tactics").

¹⁷⁷ See Becton, *supra* note 120.

¹⁷⁸ See *id.*

couriers, some people may be unfairly targeted. Even though profiling has prompted questions regarding the accuracy and the legitimacy of the technique,¹⁷⁹ it still remains one of the most popular investigative tools for law enforcement.¹⁸⁰

III. THE GOVERNMENT'S RESPONSE TO SCHOOL VIOLENCE

A. Detecting the Warning Signs

On June 13, 1998, approximately three weeks after another horrifying incident occurred at Thurston High School, in Springfield, Oregon,¹⁸¹ President Clinton directed the U.S. Department of Education and the U.S. Department of Justice ("Departments") to create a report outlining the warning signs that would assist "adults [in] reach[ing] out to troubled children quickly and effectively."¹⁸² President Clinton announced "[w]e must all do more to recognize and look for the early warning signals that deeply troubled young people send often before they explode into violence."¹⁸³ In order to create this list, the Departments reviewed some of the major school violence incidents over the past year.¹⁸⁴ From this review, the departments identified common characteristics among those students that committed the violent acts.¹⁸⁵ After the analysis, the Departments prepared *EARLY WARNING, TIMELY RESPONSE: A GUIDE TO SAFE SCHOOLS*.¹⁸⁶ The report intended to provide indicators to others that a

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See *Violence in U.S. Schools*, *supra* note 8. (On May 21, 1998, a 15-year old student, who was expelled the prior day for bringing a firearm to school, allegedly shoots two students to death in the school cafeteria. Later that day, the suspect's parents are found shot to death in their home).

¹⁸² See K. DWYER ET AL., *supra* note 24.

¹⁸³ See Timothy Egan, *School Shootings What Can We Do? Signs of Trouble Can Be Spotted but Profiling Potential Killers has its Own Costs*, GREENSBORO NEWS & REC. May 2, 1999, at H1.

¹⁸⁴ See *ABC Good Morning America: Education Officials Study Violence Prevention* (ABC television broadcast, Sept. 7, 1999).

¹⁸⁵ See *id.*

¹⁸⁶ See K. DWYER ET AL., *supra* note 24.

particular student might need some help.¹⁸⁷ Early warning signs do not necessarily imply that a student is on the verge of becoming the next school assassin.¹⁸⁸ But, it is safe to assume that if a student manifests any of the warning signs, especially if he/she exhibits a combination of the signs, then there is a need for further analysis to ascertain if some form of intervention is needed.¹⁸⁹

The following list contains the early warning signs:¹⁹⁰

- Social Withdrawal: Often comes from feelings of depression, rejection and lack of confidence.
- Excessive Feelings of Isolation and Being Alone: In some cases feelings of isolation and not having friends can be associated with violent and aggressive behaviors.
- Excessive Feelings of Rejection: May lead to expressing emotional distress in negative ways, including violence.
- Being a Victim of Violence: Physical and sexual violence victims are at risk of becoming violent towards themselves or others.
- Feelings of Being Picked On and Persecuted: Some students may express feelings in sometimes aggressive and violent ways.
- Low School Interest and Poor Academic Performance: Important to assess the reasons for academic performance change to determine the actual nature of the problem.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.* at 6.

¹⁹⁰ See *id.* at 8–11.

- Expression of Violence in Writing and Drawings: Overrepresentation of violence in writing and drawings that are aimed towards specific individuals consistently over time, may signal emotional problems and a potential for violence.
- Uncontrolled Anger: Anger that is expressed often and intensely in response to minor stimuli.
- Patterns of Impulsive and Chronic Hitting, Intimidating, and Bullying Behaviors: Constant mild behaviors, if left unattended, may lead to more serious behaviors over time.
- History of Discipline Problems: In both school and home may suggest that underlying emotional needs are not being addressed.
- Past History of Violence and Aggressive Behavior: Especially cruelty to animals and arson.
- Intolerance for Differences and Prejudicial Attitudes: Based on race, ethnicity, religion, gender, sexual orientation, or physical appearance
- Drug Use and Alcohol Use: Can reduce self-control and expose students to violence, either as perpetrators, victims, or both.
- Affiliation with Gangs: Supporting anti-social values and behaviors and causing fear and stress among other students.
- Inappropriate Access to, Possession of, and Use of Firearms: Especially by children who have a history of emotional problems.

- Serious Threats of Violence: Detailed and specific threats are considered to be the most reliable indicator of dangerousness.

With the early warning signs detected, the Departments next provided strategies to use the signs to address problems before violence occurs.¹⁹¹ Some of these strategies include: training and ongoing consultation, encouraging others to recognize and report observations of warning signs immediately, and providing access to specialists who are trained in evaluating and addressing serious academic and behavior concerns.¹⁹² Understanding and addressing the warning signs will be one step in assuring a safe school.

In addition to the early warning signs, the Departments compiled a list of the imminent warning signs.¹⁹³ Imminent warning signs are a strong indication that a student is in need of immediate assistance in controlling his/her behavior.¹⁹⁴ If a student exhibits any of these signs, then immediate attention and response is warranted.¹⁹⁵ Immediate attention is needed in order to maintain a safe school environment.¹⁹⁶ Maintaining safety will return the focus back to education, which is the primary reason for students to be in schools.¹⁹⁷

The following list contains the imminent warning signs.¹⁹⁸

- Serious Physical Fighting with Peers or Family Members.
- Severe Destruction of Property.
- Severe Rage for Seemingly Minor Reasons.
- Detailed Threats of Lethal Violence.

¹⁹¹ See K. DWYER ET AL., *supra* note 24, at 13.

¹⁹² See *id.* at 12.

¹⁹³ See *id.* at 11.

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ See K. DWYER ET AL., *supra* note 24.

¹⁹⁷ See Easterbrook, *supra* note 2.

¹⁹⁸ See *id.*

- Possession and/or Use of Firearms and Other Weapons.
- Other Self-Injurious Behaviors or Threats of Suicide.

A. Student Profiling: The FBI's Use of the Warning Signs

The summer of 1999 brought a new initiative in the battle to keep the schools safe.¹⁹⁹ In July, school officials across America sent their school psychologists to an FBI conference²⁰⁰ aimed at teaching them how to spot troubled students.²⁰¹ Furthermore, the conference focused on how to “craft a method of threat assessment helpful to both educators and law enforcement.”²⁰² Among those that attended the conference were representatives from 18 schools where shooting incidents or unsuccessful attempts have occurred.²⁰³

Numerous school administrators are now incorporating what they learned from the conference and implementing the “student profiling” policies in their districts to identify students who are believed to be prone to violence.²⁰⁴ If a student’s behavior satisfies the description of the characteristics cited in the profile, school officials will notify the parents, in an effort to stop violence before it has occurred.²⁰⁵ Wallingford, Connecticut and Granite City, Illinois are just two of the many schools to utilize student profiling in their schools.²⁰⁶

¹⁹⁹ See Daniel A. Grech, *FBI Will Offer City Lessons on Shooting; School Violence Prompts Workshop in Manassas*, WASH. POST, July 14, 1999, at V3.

²⁰⁰ The topic of the conference was “The School Shooter: A Threat Assessment Perspective.”

²⁰¹ See *NBC Nightly News: FBI Informs Educators on How to Identify Violent Kids* (NBC television broadcast, Sept. 10, 1999).

²⁰² See Press Release, FBI National Press Office, National Center for the Analysis of Violent Crime, *The School Shooter: A Threat Assessment Perspective*, July 15, 1999 (on file with author).

²⁰³ See Egan, *supra* note 183.

²⁰⁴ See, e.g., *infra* note 206.

²⁰⁵ See *Use Student Profiles Wisely*, DESERET NEWS, Sept. 9, 1999, at A16.

²⁰⁶ See *School Safety Anti-Violence Efforts Must be Balanced*, MINNEAPOLIS STAR TRIB., Sept. 22, 1999.

In Wallingford, the Superintendent of Schools, Joseph Cirsuolo, decided to utilize student profiling techniques to help control school violence in his district of 7,000 students.²⁰⁷ Cirsuolo was enthusiastic about profiling, even though the most violent incident recorded was a fist-fight.²⁰⁸ The profile of characteristics used in his school district included, "abusive language, cruelty to animals and writing that reflects an interest in the 'dark side of life'."²⁰⁹ This profile of a potentially dangerous student would be furnished to all of the school personnel throughout the district.²¹⁰ Cirsuolo said that if a student's behaviors fit the profile, then the remedy would be to notify the parents.²¹¹ Furthermore, he insisted that this violence prevention approach would aspire to "intervene well before [a student] ever decide[s] to go out and buy a gun and do some damage."²¹²

The Granite City, school district has proposed to utilize the same techniques as Wallingford.²¹³ One of Superintendent, Steve Balen's reasons for adopting profiling is that a school shooting occurs on average, every 13 weeks.²¹⁴ He wants to make sure that his school is not the next target.²¹⁵ If a student's behaviors fall under the scope of the profile, the student could be forced into counseling, get transferred to another school district, or get expelled.²¹⁶ The school district is pleased to report that since they commenced the use of the profile, they have "identified a troubled teen-ager who had access to guns at home."²¹⁷ The Superintendent stresses that the student can

²⁰⁷ See *Schools on Lookout for Violence-Prone: Some Districts Resort to Student Profiling*, CINCINNATI POST, Sept. 8, 1999, at 4A.

²⁰⁸ See *NBC Nightly News*, *supra* note 201.

²⁰⁹ See *Use Student Profiles Wisely*, *supra* note 205.

²¹⁰ See *Use Student Profiles Wisely*, *supra* note 205.

²¹¹ See *Use Student Profiles Wisely*, *supra* note 205.

²¹² See *Use Student Profiles Wisely*, *supra* note 205.

²¹³ See *ABC World News Tonight: Schools Adopt Profiling to Identify Violent Students* (ABC Television Broadcast, Dec. 15, 1999).

²¹⁴ See *id.*

²¹⁵ See *id.*

²¹⁶ See Rall, *supra* note 23.

²¹⁷ See *NBC Nightly News*, *supra* note 201.

effectively deal with his anger now that the guns have been removed from the home.²¹⁸

But can schools impose such harsh sanctions upon the students just because the student may have some dangerous characteristics? While the Supreme Court has not yet addressed the issue of student profiling, it has held that other types of profiles are constitutional methods of law enforcement.²¹⁹

B. Profiling and Reasonable Suspicion in the School Setting

States have a legal duty to protect students from violence while they are in school.²²⁰ This duty arises from two sources, (1) the “*in loco parentis*” doctrine²²¹ and (2) the notion that school officials possess a legal duty to comply with state and school board regulations.²²² Schools need to protect the students from violence, and effectively ensure their safety. One way to accomplish this goal is to anticipate the violence before it occurs.

In 1985, the Supreme Court announced that the Fourth Amendment protected the rights of public school students against unreasonable searches or seizures by school officials.²²³ In *New Jersey v. T.L.O.*, the Court further held that a limited search constituted

²¹⁸ See *id.*

²¹⁹ See, e.g., *Mendenhall*, 446 U.S. 544 (1980).

²²⁰ See Donald L. Beci, *School Violence: Protecting our Children and the Fourth Amendment*, 41 CATH. U.L. REV. 817, 823 (1992).

²²¹ Under the *in loco parentis* doctrine, schools have an affirmative duty to protect students in danger who are subject to a foreseeable risk of harm. *Id.* See also *Hurlburt v. Noxon*, 565 N.Y.S.2d 683, 685 (Sup. Ct. 1990) (holding that the school district has a legal duty to protect its students).

²²² See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (stating that the schools have the authority to create rules and regulations).

²²³ See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that although the standard is less stringent, the Fourth Amendment does apply in a public school setting). See also Daniel, *supra* note 9. (The facts of *T.L.O.* indicated that a teacher discovered two students smoking cigarettes in a school bathroom. The teacher reported the incident to a principal. One of the student’s admitted smoking, while the other student denied it. The principal then searched the second student’s purse and discovered cigarettes. The student claimed that her Fourth Amendment rights had been violated by the principal’s actions. However, the Supreme Court held that the Fourth Amendment applied in the school setting even though the standard is less stringent).

an invasion of privacy, no matter how minor.²²⁴ However, the Court held that a search conducted without a warrant would be constitutionally justified if, given the totality of the circumstances, it was reasonable.²²⁵ Ordinarily to conduct a search, a law enforcement officer needs either a warrant or probable cause, but if the search is conducted on school premises, then the lesser standard of reasonable suspicion prevails.²²⁶ Therefore, if the school official reasonably suspects, through articulable facts that a school law or policy has been violated, then the official is justified in conducting a search.²²⁷

The lesser standard of reasonableness is still applicable when the school official suspects the student is committing or about to commit violence.²²⁸ The standard enunciated in *T.L.O.* provides schools with enough authority to preserve order in the schools.²²⁹ Schools do not have to become probable cause specialists. They simply need to elucidate that "their actions [are] reasonably related to legitimate pedagogical concerns" or the minimum scrutiny standard.²³⁰ Since schools are acting *in loco parentis*, they are justified in ensuring a safe environment.²³¹ Therefore, it seems conceivable and justified that the Supreme Court would hold that stopping a potential school predator pursuant to a student profile is constitutional.

C. Profiling and Procedural Due Process Concerns

Although profiling may be an effective technique to apprehend a student before he or she walks into a school armed with a machine-gun or a pipe bomb, punishing a student, with expulsion or other similar penalties, who has not yet acted could potentially deprive the student of his or her due process rights under the

²²⁴ 469 U.S. 325 (1985).

²²⁵ See *id.* at 333 n. 2.

²²⁶ See Daniel, *supra* note 9. See also *T.L.O.*, 469 U.S. 324 (1985).

²²⁷ See Daniel, *supra* note 9, at 585.

²²⁸ See Daniel, *supra* note 9, at 586.

²²⁹ See *T.L.O.*, 469 U.S. at 343 (1985).

²³⁰ See Daniel, *supra* note 9 at 587.

²³¹ See Beci, *supra* note 220, at 822.

Fourteenth Amendment.²³² True, the Supreme Court has ruled that public education, regardless of its importance in American society is not a fundamental right.²³³ However, the Court has recognized, in *Goss v. Lopez*, that students have a "property interest" in a public education.²³⁴

Since the Supreme Court has acknowledged a property interest in attending school, it follows that such an interest can not be stripped away without providing due process which prevents "arbitrary deprivations of liberty."²³⁵ Therefore, the interest in receiving an education cannot be abridged because of misconduct without providing the student "fundamentally fair procedures to determine whether the misconduct has even occurred."²³⁶ Such procedures must include notice that the conduct is prohibited and an opportunity for the student to have a hearing.²³⁷

As a general rule, prior to the imposition of penalties, a student *must* receive either oral or written notice of the charges, an opportunity to hear the evidence against him or her, and a chance to be heard.²³⁸ There is no bright-line rule to determine if the intricacies of due process are fulfilled, and thus, the Supreme Court has utilized a balancing approach to determine if due process was satisfied.²³⁹

²³² U.S. CONST. amend XIV. The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

²³³ See *Plyler v. Doe* 457 U.S. 202, (1982). The Supreme Court stated that the public education is not "merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction." *Id.* at 221. See also *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that education is a benefit conferred by the states).

²³⁴ 419 U.S. 565, 574 (1975).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See *Draper v. Columbus Public Schools*, 760 F. Supp 131, 133 (S.D. Ohio, 1991). See also Wood and Chestnutt *supra* note 7, at 629.

²³⁸ *Goss*, at 582. See also Jennifer L. Barnes, *Students under Siege: Constitutional Considerations for Public Schools Concerned with School Safety*, 34 U. RICH. L. REV. 621, 642, (2000).

²³⁹ *Draper* at 133 (measuring both the interest of the person whose rights are at stake and the competing state interest in preventing violence).

Certainly there are situations where it is difficult to provide the student with due process before the penalties is imposed, for example, when a student has engaged in violent activity, as opposed to one who has not acted yet.²⁴⁰

In light of the existing student profiling method and in assessing penalties for behavior or personality traits consistent with the checklist, evidence of complying with constitutional due process requirements is inconclusive. Students whose behavior and/or personality traits that are consistent with a checklist are not being given a chance to explain his or her side of the story. Furthermore, in looking at the checklist, schools are given too much leeway to point the finger at so-called dangerous students. Are there some characteristics that are worse than others? What if a student uses alcohol and is socially withdrawn, but is also a straight "A" student and enjoys reading poetry and literature? Is this taken into account when using a "balancing" approach? How do schools explain providing Student A with a hearing before he gets expelled, while giving Student B the hearing after he gets expelled?²⁴¹ Ultimately administrators, when given the task to rid schools of violence, will fail if they use this checklist.

IV. STUDENT PROFILING RECEIVES HARSH CRITICISM

As seen by some school superintendents, who have decided to implement student profiling policies into their school districts, many are applauding this violence prevention technique.²⁴² Furthermore, other officials seek comfort with social science assistance in detecting violent characteristics and isolating behavior before any damage can be done.²⁴³ When given the choice between protecting safety in the

²⁴⁰ *Goss* at 582.

²⁴¹ The school may contend, consistently with *Goss v. Lopez*, that Student B posed an immediate threat.

²⁴² See *infra* notes 243–244.

²⁴³ See Timothy Egan *Violence Checklist No Guarantee of Safety: Developing a Profile on Potentially Dangerous Teens Won't Always Avert Disaster*, MILWAUKEE J. & SENTINEL, Apr. 27, 1999, at 12.

schools and protecting students' rights, some school officials would rather "err on the side of safety."²⁴⁴

However, while student profiling may seem like a viable technique to prevent the schools from being subjected to mindless acts of violence, many critics abhor the practice and aren't shying away from voicing their opinions.²⁴⁵ Critics, like the ACLU, are challenging student profiling as an "overreaction to the rash of school shootings."²⁴⁶ Moreover, the ACLU urges that "[t]here should not have to be a trade-off between security and safety on the one hand and students' rights on the others."²⁴⁷ One of the primary obstacles that supporters of student profiling are facing is that because a student may be characterized as "different doesn't mean [he is] dangerous."²⁴⁸ Likewise, students who fail to satisfy the normative qualities of the ideal student, which would obviously encompass not being violent, may be unfairly labeled as dangerous, when in fact, they are simply not.²⁴⁹ "It's unfair to students to stereotype them, and to say [that just] because they have something in common with other students who have, in fact, committed violence crimes that, therefore, they, themselves are likely to commit a crime."²⁵⁰

Another criticism of this technique is that it invokes a self-fulfilling prophecy into the minds of students.²⁵¹ If the student is labeled dangerous, then the teacher might treat that student differently. Perhaps the teacher won't correct errors that the student makes for

²⁴⁴ See Mary Lord, *The Violent-Kid Profile*, U.S. NEWS AND WORLD REPORT, Oct. 11, 1999, at 56.

²⁴⁵ See, e.g., *id.*

²⁴⁶ See Schools on Lookout for Violence-Prone: Some Districts Resort to Student Profiling, CINCINNATI POST, Sept. 8, 1999, at 4A. See also *U.S. Secret Service supra* note 51, at 1.

²⁴⁷ See Lord, *supra* note 238.

²⁴⁸ See *supra* note 246.

²⁴⁹ See Lord, *supra* note 238. See also Bill Dedman Schools May Miss Mark on Preventing Violence, CHICAGO SUN-TIMES, Oct. 16, 2000 at 6. "Profiling can unfairly label or stigmatize students who stand out because of dress or musical interests or other characteristics."

²⁵⁰ See *NBC Nightly News, supra* note 201 (citing Ms. Nadine Strossen, National President of the ACLU and Professor of Constitutional Law at New York Law School).

²⁵¹ See, e.g., *Fox The Edge with Paula Zahn* (Fox News Network Broadcast, Sept. 23, 1999).

fear that the student will retaliate with violence. Also, the teacher might be afraid to send the student to the principle if he/she misbehaves for fear that the student will return to the class with a machine gun. "If a student feels he's being labeled, then he may not give his best effort for that teacher or for the school."²⁵² Moreover, once a student is labeled that information could potentially follow him/her throughout remainder of his/her educational career.²⁵³ That student may then choose to act consistently with the label he/she is given.²⁵⁴ It is quite possible that the student might believe that if others have already deemed him/her dangerous, then "why let them down?" Behavior consistent with a self-fulfilling prophecy would not effectively deter crime. In fact policing our schools by using student profiling would only add fuel to the fire.

Experts exhort that school districts are inviting trouble if they decide to invoke profiles to detect possible offenders.²⁵⁵ Kevin Dwyer, National Association of School Psychologist's president, and writer of the warning sign checklist,²⁵⁶ is entirely disturbed that some schools have used the list to create a profile aimed at targeting potentially violent students.²⁵⁷ He even offers that profiles can realistically include any teenage student that is suffering from typical signs of adolescence.²⁵⁸ In addition, Dwyer notes that placing the

²⁵² *Id.*

²⁵³ See Gretchen McKay, *Can 'Profiling' Prevent School Violence? Its Critics Fear that Some Kids Would be Branded Unfairly*, PITTSBURGH POST-GAZETTE, Oct. 27, 1999, at A1 (North Allegheny [PA] school director Joe Morrison has rejected his school superintendent's student profiling proposal because it "will be stigmatic for these kids").

²⁵⁴ *Id.*

²⁵⁵ See *Profiling Students May Cause More Harm; Experts Warn not to use Checklists to Pick Potentially Violent Students out of the General Population*, LRP PUBLICATIONS, Oct 6, 1999.

²⁵⁶ See K. DWYER ET. AL., *supra* note 24.

²⁵⁷ See *supra* note 255 ("We produced a very strong caution about not using it to profile kids"). See also *The FBI's Risky Checklist the Issue: FBI Lists 'School Shooter' Traits; Our View: Schools Run Risk in Overzealous Use of the Plan*, DENVER ROCKY MOUNTAIN NEWS, Sept. 8, 2000 at 59A (citing the FBI's "strong caution" that the checklist not be used to profile or predict violent behavior.)

²⁵⁸ See Lord, *supra* note 244 ("Listens to songs that promote violence . . . Appears to be an average student . . . Isolated . . . Dresses sloppily . . . I mean, excuse me. This is another definition of adolescence!")

responsibility of profiling “53 million children . . . in the hands of people who don’t understand the material...[will cause] irreparable harm.”²⁵⁹ Hill Walker, co-director of the Institute on Violence and Destructive Behavior at the University of Oregon maintains that if schools insist on using profiles to detect violence, they are not going to procure the results desired.²⁶⁰ The use of student profiling bears a danger of over-identification, for a vast majority of students fitting a profile will not truly pose a threat of violence.²⁶¹ Many students go through a rough period at some point during adolescence.²⁶² To force a student to conform to a strict set of behavioral guidelines would not promote individuality.²⁶³ Students certainly have a “right to free expression;”²⁶⁴ they don’t “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”²⁶⁵

Finally, the U.S. Secret Service has concluded that students come to school to kill “don’t just snap.”²⁶⁶ Students who are going to

²⁵⁹ See *id*

²⁶⁰ See *supra* note 255 (“The potential of abuse is as great as the potential of violence. By profiling you’ll get far more false positives, where the student may appear to be at risk but isn’t, than false negatives. They are the ones who don’t appear to be at risk but really are”). See also Editorial, *The FBI’s Risky Checklist the Issue: FBI Lists ‘School Shooter’ Traits; Our View: Schools Run Risk in Overzealous Use of the Plan*, DENVER ROCKY MOUNTAIN NEWS, Sept. 8, 2000 at 59A (claiming a greater risk that schools will “misidentify students who are potential threats than reason to expect that they will home in on the few truly dangerous sociopaths bent on violence”).

²⁶¹ See U.S. Secret Service *supra* note 51, at 5.

²⁶² See *Use Student Profiles Wisely*, *supra* note 205. See also *School Violence—Student Profiling Raises Specter of Policing Thoughts*, SEATTLE TIMES, Sept. 14, 1999, at B5. “The schools will do a good job surely in stopping these menaces in their tracks. We will once and for all rid our society of the Stephen Kings (and his nasty writings), the John Lennons (who always mouthed off and fought in school), the Franz Kafkas, yes, even the William Shakespeares. Then we will have kids who only think the good conforming thoughts that the school psychologists deem acceptable.” *Id.*

²⁶³ See Daniel A. Grech, *FBI will Offer City Lessons on Shooting; School Violence Prompts Workshop in Manassas*, WASHINGTON POST, July 14, 1999, at V3. “[Y]ou end up stigmatizing good kids by calling them future killers,” contends James Alan Fox, professor of criminal justice at Northeastern University. *Id.*

²⁶⁴ See ACLU Newswire, *Does Different Mean Deadly? More Fallout from School Shooting* (May 10, 1999), at <http://www.aclu.org/news/1999/w051099a.html> (last visited Sept. 27, 1999).

²⁶⁵ See *Tinker*, 393 U.S. 503, 506 (1969).

²⁶⁶ See U.S. Secret Service *supra* note 51, at 4. See also *Students who Kill Often Send Loud Signals, Secret Service Says*, ORLANDO SENTINEL, Oct. 15, 2000 at A8.

be likely killers: 1) develop the idea to harm the target(s) before the attack,²⁶⁷ 2) plan the attack,²⁶⁸ and 3) tell someone about the idea or plan.²⁶⁹ Thus, these “clues”²⁷⁰ could have been used to prevent various violent attacks in the schools. Department of Education Secretary Richard Riley has been credited with stating that “[y]oung people who need help do not keep it a secret.”²⁷¹

CONCLUSION

Just because a particular law enforcement technique survives constitutional muster, it may not necessarily be an effective method in terms of violence prevention. In the long run, student profiling will not be a winning technique to deter crime in the schools. It is “not effective for identifying students who may pose a risk for targeted violence at school or — once a student has been identified — for assessing the risk that a particular student may pose for school-based targeted violence.”²⁷² All too often schools are creating profiles that could realistically include any student “suffering from teenage angst.”²⁷³ Who doesn’t know a kid aged 14-18 who doesn’t dress differently, or the way society would hope they’d dress? Who doesn’t know a kid who likes weird video games and dark movies? Who doesn’t know a kid who would rather associate with friends than stay at home with his/her parents on a Saturday night? Profiles could “fit most teenagers on a bad day, and some on a good day.”²⁷⁴

²⁶⁷ See U.S. Secret Service *supra* note 51, at 3. Over 1/2 attackers developed the idea at least 2 weeks prior to the incident.

²⁶⁸ See U.S. Secret Service *supra* note 51, at 3. More than 1/2 attackers developed the plan at least 2 days prior to the incident.

²⁶⁹ See U.S. Secret Service *supra* note 51, at 1.

²⁷⁰ See *Students who Kill Often Send Loud Signals, Secret Service Says*, *supra* note 266.

²⁷¹ *Id.*

²⁷² See U.S. Secret Service *supra* note 51, at 1.

²⁷³ See Lord, *supra* note 244.

²⁷⁴ See Timothy Egan, *School Shootings What Can We Do? Signs of Trouble Can be Spotted but Profiling Potential Killers has its Own Costs*, GREENSBORO NEWS & REC., May 2, 1999, at H1.

If schools continue to profile students they are surely asking for trouble for profiling is a "double-edged mistake."²⁷⁵ Often, it is the student who does not demonstrate the violent characteristics that ends up being dangerous and deadly. Students at Columbine High School remember the killers as being "wallpaper-shy students who played cards in the lunchroom and helped others with computer problems."²⁷⁶ Furthermore, lawsuits have already been filed against other types of profiling, i.e. profiling based on race.²⁷⁷ What makes anyone sure that student profiling will not receive the same litigious treatment?

If violence prevention is the ultimate goal, then certainly there are other, more useful techniques that would benefit student behavior and school safety. Dwyer contends that if a child demonstrates any of the warning signs, then it is better to keep him/her under adult supervision until an appropriate remedy can be developed.²⁷⁸ Schools should, let students help each other handle emotional problems, anxieties, and fascinations with different things.²⁷⁹ Utilizing peer mediation programs could provide students and faculty with a more effective method to help prevent minor altercations from becoming violent combat.²⁸⁰ In fact, other violence prevention methods such as dress codes, zero tolerance policies, and metal detectors surely would be less intrusive, and less cumbersome to the students. With policies like those, the students would not feel constant pressure to be just like everyone else. Students would be able to thrive academically and

²⁷⁵ See Tom Vogt, *Student Shooters Don't Fit a Neat Profile*, COLUMBIAN, Nov. 3, 2000 at C1.

²⁷⁶ See *id.*

²⁷⁷ See ACLU Newswire, *ACLU Announces Settlement of Lawsuit Over 'Racial Profile' Stops* (Jan 4, 1995), at <http://www.aclu.org/news/n010495.html>. The Maryland Chapter of the ACLU settled a 1993 lawsuit challenging Maryland State Police with using racial profiles as a basis for stopping motorists. Among other things, the agreement provides that the state police would establish a policy to prohibit the use of racial profiles as a basis for police stops, and detention of motorists. *Id.*

²⁷⁸ See *Profiling Students May Cause More Harm; Experts Warn not to use Checklists to Pick Potentially Violent Students out of the General Population*, LRP PUBLICATIONS, Oct 6, 1999.

²⁷⁹ See Kelly Roxmus, *Peer Mediation Programs in Schools: Resolving Classroom Conflict but Raising Ethical Concerns?*, 26 J.L. & EDUC. 69, (1997).

²⁸⁰ See *id.*

administrators could take their attention away from labeling students and back towards providing an excellent education to kids.

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